

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 - - - - - x

5 In the Matter of:

6

7 SEARS HOLDINGS CORPORATION and

8 RAY PADULA HOLDINGS, LLC,

9

10 Debtors.

11 - - - - - x

12

13 United States Bankruptcy Court

14 300 Quarropas Street, Room 248

15 White Plains, NY 10601

16

17 October 25, 2018

18 2:02 PM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: NAROTAM RAI

Page 2

1 HEARING re Joint Objection to Motion /Joinder to Objections
2 to Debtors Motion for Approval of (I) Procedures for Store
3 Closing Sales and (II) Assumption of Liquidation Consulting
4 Agreement (related document(s)23)

5

6 HEARING re Objection to Motion I LIMITED OBJECTION OF ALLURE
7 GEMS, LLC TO DEBTORS MOTION FOR APPROVAL OF (I) STORE
8 CLOSING SALES AND (II) ASSUMPTION OF LIQUIDATION CONSULTING
9 AGREEMENT (related document(s)23)

10

11 HEARING re Objection (related document(s)23)

12

13 HEARING re Notice of Hearing on Motion of Debtors for
14 Interim Approval of (I) Procedures for Store Closing Sales
15 and (II) Assumption of the Liquidation Consulting Agreement
16 (related document(s)23)

17

18 HEARING re Notice of Hearing: Notice of Time Change for
19 Hearing on October 25, 2018 (related document(s)23)

20

21 HEARING re Response/ Debtors Response in Support of Motion
22 for Approval of (I) Procedures for Store Closing Sales and
23 (II) Entry into the Liquidation Consulting Agreement
24 (related document(s)223, 281, 23,224,228,225,251,254,
25 289,211,246,278,243,260,280,242,270,247,255,249)

Page 3

1 HEARING re Notice of Agenda of Matters Scheduled for Hearing
2 on October 25, 2018 at 2:00 p.m.

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 MR. SHROCK: Good afternoon, Your Honor. Ray
3 Shrock, Weil Gotshal & Manges, proposed counsel for the
4 Debtors. I'm here with my partner Sunny Singh.
5 (indiscernible).

6 Your Honor, very briefly, just before we get
7 started on the GOB procedures motion, I wanted to give the
8 Court and parties in interest a quick update before, I
9 believe, the proposed counsel for the unsecured creditors
10 committee stands, let me say a few words.

11 THE COURT: Okay.

12 MR. SHROCK: We've obviously had a very busy week
13 last week as the company commenced the Chapter 11 cases.
14 I'm pleased to report that I think the company has
15 stabilized to a large degree operations and, in fact, the
16 company did much better than forecasted under the DIP budget
17 this last week, which was one of the reasons that the
18 company decided to adjourn the junior Debtor in Possession
19 financing motion.

20 But there's been quite a bit of activity on that
21 front. I think Lazard has spent well in excess of 100 hours
22 contacting potential so-called junior Debtor in Possession
23 financing lenders, you know, lots of NDAs. And there's
24 quite a bit of activity on that front.

25 We felt that it was appropriate to continue that

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1 effort, given the interest that's out there is quite a bit
2 of interest on that financing. And we're looking at
3 structures, not just along the ESL financing route, but
4 we're also considering different structures. And we've been
5 contacted by a number of different financial institutions
6 about different ways to structure the financing package for
7 the Debtors. And so that's requiring us -- we're going to
8 have to work with the senior lenders, you know, these
9 proposed junior lenders, but given the company is not facing
10 a significant liquidity need right now, and given that we
11 have the time, we thought it was appropriate so we can
12 involve the creditors committee and others to continue that
13 effort.

14 THE COURT: Okay.

15 MR. SHROCK: Likewise, Your Honor, we're pleased
16 that a creditors committee formed. I think we have our
17 initial download with the advisors scheduled for later this
18 afternoon at our offices with the Akin Gump, and we hope
19 their proposed financial advisor. But with that, I'll turn
20 it over to Abid.

21 THE COURT: Okay.

22 MR. QURESHI: Thank you. Good afternoon, Your
23 Honor. For the record, Abid Quershi along with Phil Dublin,
24 Akin Gump Strauss Hauer & Feld, proposed counsel to the
25 official committee of unsecured creditors.

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1 As Your Honor is aware, a nine-member committee
2 was appointed by Mr. Schwartzberg in the U.S. Trustee's
3 Office yesterday. Your Honor, the members are the PBGC, we
4 have to indentured trustees, Bank of New York and
5 Computershare, two trade creditors, Apex Tools and
6 WINIADAEWOO Electronics. There are also two individuals on
7 the committee, Mr. Vasiliu, who is a bondholder, as well as
8 Mr. Cruz, who is a representative plaintiff in a California
9 wages and hours action; and, finally, Your Honor, two
10 landlords, Brixmor Operating Partnership, LP, and Simon
11 Property Groups.

12 So, Mr. Tucker of Simon Property and Mr. Vasiliu
13 will serve as co-chairs of the committee. Your Honor, it's
14 a diverse committee as is the unsecured creditor pool of
15 these estates.

16 Your Honor, there is a tremendous amount of work
17 for the committee to do on many fronts, and all of the work
18 streams are time sensitive. As Mr. Dublin and I are in
19 court, the committee is in the process of interviewing
20 financial advisors and potential investment bankers. So we
21 hope to have the full complement of advisors in place before
22 the end of the week.

23 Your Honor, as it relates to the investigation of
24 potential claims against ESL and other parties, we expect
25 complete and transparent cooperation from everybody. We've

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1 had an initial round of calls with all of the relevant
2 professional -- with Mr. Shrock and his team at Weil, with
3 Paul Weiss, who represents the special committee of
4 independent directors, and Cleary Gottlieb who represents
5 ESL. And all of those parties, Your Honor, have pledged to
6 cooperate, and all of the initial calls that we had were
7 encouraging, as we would've expected.

8 Your Honor, to the extent that we encounter any
9 issues concerning access to information or access to people,
10 we will not hesitate to be back before this Court to seek
11 the necessary relief. This is an investigation that has a
12 myriad of issues and it is time sensitive, and we need that
13 cooperation. Our investigation will be comprehensive and it
14 will be independent. Thank you, Your Honor.

15 MR. SINGH: Good afternoon, Your Honor. Sunny
16 Singh, Weil Gotshal, proposed counsel for the Debtors. Your
17 Honor, the only motion that we have on for today is a GOB
18 procedures order and motion. And, Your Honor, I'm pleased
19 to report that I think, with the revised version of the
20 order that we filed with the Court just about two hours ago
21 -- and thank you for your indulgence, Your Honor -- and some
22 tweaks that we've made this morning that I'll review with
23 the Court, that I think it resolves everybody's issues. And
24 we do have a consensual order. Although I'll admit I
25 haven't spoken to every person in this courtroom, so

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1 somebody may come up and say something.

2 We've worked with the DIP lender, we've worked
3 with all the consignment vendor parties that have filed
4 objections. We also work with the UCC and we appreciate
5 their quick review of the order. We've incorporated their
6 comments as well as the United States Trustee's Office. And
7 so all of those changes are reflected and in.

8 Your Honor, I don't know if you have a copy of the
9 black line that was filed. I can certainly bring one up.

10 THE COURT: Well, I have two black lines. One
11 from either last night or this morning and one from a couple
12 of hours ago.

13 MR. SINGH: Oh, okay. Great. So, Your Honor, if
14 it's all right with you, before addressing any questions you
15 may have, maybe I can just -- just to catch you up on where
16 we are with a couple of changes that we incorporated this
17 morning. And I'm looking at the red line that was filed at
18 about noon.

19 THE COURT: Yeah, I have that in front of me

20 MR. SINGH: It's the incremental red line. So,
21 Judge, just one clarification change. Paragraph 7. This is
22 just regarding the Debtors abandoning certain property. We
23 did add that we'll do it in consultation with the creditors
24 committee. But just in the proviso we wanted to be clear
25 that, to the extent any assets remain at the leased premises

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1 after the completion of the applicable stores therein -- and
2 notice by the Debtors is what we'd like to add just to make
3 clear that, you know, we would provide notice of what we're
4 abandoning (indiscernible) may end up not being rejected,
5 notwithstanding that they're being closed.

6 Your Honor, moving on and really to get to the
7 heart of this in the consignment section that was added, and
8 that really starts at Paragraph 34, conceptually, Judge,
9 just so you understand kind of where we landed with the
10 consignment vendors and the DIP credit parties, we've gotten
11 to a place where the consignment vendors had the ability to
12 continue to ship and be paid post-petition proceeds of their
13 goods. The Debtors are going to segregate those proceeds in
14 a separate reserve account, and the DIP lender liens as well
15 as the adequate protection liens will not cover or attach to
16 the consigned goods, or the proceeds, or that reserve
17 account. So it's really going to be segregated and separate
18 and apart from the DIP lenders.

19 We will, of course, report to the lenders the
20 amounts that are in there as a segregated property so that
21 it's not inadvertently included in the borrowing phase, and
22 we'll work out appropriate reserves, to the extent those are
23 necessary, with the DIP lenders as part of the final DIP
24 order.

25 So, we'll be back to you on the mechanics, but

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1 generally speaking we sort of confirmed with everybody that
2 consigned goods are outside of the liens of the added
3 protection DIP liens that have been authorized.

4 THE COURT: Right.

5 MR. SINGH: Your Honor, so a couple of changes
6 that I'll just review with you. If you go to Paragraph 35,
7 this is the language relating to exactly what I just
8 referred to last where the DIP liens do not attach. And
9 I'll just read it.

10 So it says, "For the avoidance of doubt,
11 notwithstanding anything to the contrary of the interim DIP
12 order or the final DIP order, any properly perfected notice
13 of valid consignment interests as defined in the UCC in and
14 to the consignment merchandise..." And so that language is
15 really covering the prepetition goods that were shipped.
16 And then we would add "or shipped post-petition pursuant to
17 this order. And pursuant to this order, the vendor proceeds
18 in the reserve account shall not be subject to the DIP liens
19 are adequate protection liens."

20 So we're just making clear that it's the
21 prepetition liens as well -- the prepetition goods that were
22 properly perfected as well as post-petition that are being
23 shipped pursuant to this order because there won't be
24 (indiscernible).

25 And in Paragraph 38, Your Honor, where we talk

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1 about reporting with respect to the DIP lenders, we've also
2 made clear there that if any consignment vendor requests a
3 copy of the report, we would share that report to the extent
4 it relates to that particular consignment vendor. So that
5 they have the evidence that they need -- you know, that
6 we've reported it to the DIP lender, and if they have an
7 issues, they can raise it with us.

8 So, I think those are the two changes, Your Honor.
9 We also moved around a couple of definitional things. We'll
10 have some cleanup. And what we were proposing is the DIP
11 lenders want to review -- their counsel want to review it
12 with the parties. I think the consignment vendors and their
13 counsel would want to take one more look at everything. So
14 maybe after this hearing is circulated and submit an order
15 to Your Honor with an updated red line once we're done with
16 that.

17 Somebody -- yeah, so that was -- I'm just being
18 reminded, Your Honor, that at 34, we're just going to move
19 the definition -- we're just going to move the definition in
20 the second line there "of consignment merchandise" to after
21 the phrase "whether delivered to the Debtor's prepetition or
22 post-petition" so it picks up and it tracks like the rest of
23 it.

24 THE COURT: Consistent with the other changes.

25 MR. SINGH: That's right, Judge. So, again, we'll

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1 submit -- after just making sure everybody has one last
2 opportunity to look, we'll submit it to Your Honor.

3 I also wanted to report, Judge, that the U.S.
4 Trustee's objection as you saw from my reply, has been
5 resolved as to the retention of Abacus. The agreement will
6 be assumed on an interim basis, and we've agreed with the
7 UCC that they'll have five business days to just make sure
8 that they can take a look at this before we pay the cure
9 amount, which is approximately \$500,000. And so pending the
10 prepetition work that they've done.

11 Abacus, Your Honor, you know, we believe the
12 qualifications are set out in the motion. They've
13 liquidated already over 800 of the Sears and K-Mart
14 locations, and have over ten years of experience with this
15 company. We think the pricing is also extremely favorable,
16 especially when you compare it to other mass liquidations,
17 such as Toys.

18 So, Your Honor, we believe the U.S. Trustee's
19 objection is resolved. We already filed a 2040 Declaration,
20 which was their request, and we'll be reporting and giving
21 an opportunity to them and UCC to review any issues, and if
22 they have any objection with respect to the fees, they can
23 raise it.

24 Judge, just two points of clarification on Abacus.
25 First, just to be clear, the Debtors' agreement with Abacus

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1 is only exclusive as to the stores that have been
2 specifically designated to be closed by Abacus. And to
3 date, we've designated the first 142 of the initial stores.
4 To the extent that we determine to close additional stores
5 in the future, the Debtors are free to use another
6 liquidator should they so choose. And, second --

7 THE COURT: So, if you're going to use Abacus for
8 those in the future you need to amend the agreement again?

9 MR. SINGH: No, the agreement authorizes us to
10 just continue to designate as we see fit.

11 THE COURT: Which is within the Debtor's control?

12 MR. SINGH: Right. It's within the Debtor's
13 control. And the reason it's important, Judge, because the
14 second point is it's a condition precedent to the closing of
15 the DIP agreement, the senior DIP agreement with Mammal and
16 the other re-arrangers that prior to the final closing date
17 with respect to the remaining stores, the Debtors must
18 retain a liquidating consulting firm that's acceptable to
19 them under the terms of the agreement. So if there's any
20 issues, we'll have to resolve that.

21 THE COURT: Okay.

22 MR. SINGH: So, Judge, I think that's it with
23 respect to the changes I wanted to review. One more just
24 point of clarification. In Paragraph 25, which relates to
25 the master lease -- and this is really the Seritage and the

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1 other JD lease structures -- this is really -- in case
2 there's any confusion, Your Honor, this is really to make
3 clear that we're not addressing pursuant to this order or
4 the fact that we can, you know, commence store closings, any
5 issues relating to the severability of the lease or whether
6 a piece is being -- you know, one lease is being assumed or
7 not. All parties' rights are reserved with respect to that
8 and any other master lease. And should we need to come
9 back, we'll be able to come back, Your Honor. But we didn't
10 see the need to deal with that issue and the landlord's
11 counsel did agree. So, I think that takes care of that
12 issue.

13 Okay, Your Honor, I think I covered everything
14 that I had. If there's questions that you have or any
15 remarks to the order, I'm happy to consider them and
16 respond, Your Honor.

17 THE COURT: Okay. Well, let me ask whether -- I
18 think we've got up to 20 objections. Let me ask whether any
19 of the objectors have anything more to say on this motion,
20 or whether they're satisfied with the changes that the
21 Debtors have inserted into the proposed order and the store
22 closing procedures.

23 MR. SUMMERS: Good afternoon, Your Honor. Matthew
24 Summers, Ballard Spahr, on behalf of a handful of landlords:
25 Macerich Company, Centennial Real Estate, CF Johns Company,

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1 Brixmor, and Extract LLC.

2 Your Honor, we had resolved our issues in our
3 objection through negotiation of a side letter agreement
4 with the liquidator and the Debtor, and there are some
5 changes that are made to Paragraph 3 of the proposed order
6 that inserts the committee into the process.

7 We had some concerns about that but you've
8 resolved that by having the committee -- the committee's
9 counsel was extremely responsive today when I reached out to
10 them. They've reviewed the side letter agreement that we
11 had negotiated that would apply to our clients, and they've
12 confirmed that they're satisfied with it and have no
13 objection to it, so we're free to proceed under the side
14 order agreement. And that would apply to our clients.

15 And then I had one (indiscernible) make sure it
16 gets into the final version that gets submitted. I think
17 there's a comma missing after the added language to
18 Paragraph 3, the first part. So I understand
19 (indiscernible). But with that, we are resolved.

20 THE COURT: All right.

21 MR. CORBI: Good afternoon, Your Honor. Richard
22 Corbi of Moses Singer on behalf of Rosy Blue and E.J. Gold.
23 I want to thank the Debtor's counsel for incorporating our
24 products -- about two objections to the original motion. As
25 long as all the comments that we have are incorporated in

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1 the final order, our clients will be -- our objection will
2 be resolved. But one issue I just don't waived is any
3 potential critical vendor issue that our clients may have at
4 this point.

5 THE COURT: I'm not sure what that means.

6 MR. CORBI: Essentially reserving my rights on any
7 critical vendor issue.

8 THE COURT: Okay.

9 MR. CORBI: And I know it's not for this motion
10 but just...

11 THE COURT: And when you say your comments, those
12 are the ones that are in the order?

13 MR. CORBI: Those are the ones that are in the
14 order and what Mr. Singh has presented to the Court. Thank
15 you.

16 MR. MOLDOVAN: Good afternoon, Your Honor. Joe
17 Moldovan, Morrison Cohen. We've worked extensively with
18 Debtor's counsel on keeping the modifications to the
19 proposed order. Allure Gems is satisfied with the changes
20 that have been made and as have been described by the Court
21 -- have been described by Debtor's counsel to the Court.
22 And we thank the Debtor and the secured lender's counsel for
23 the work on this. Thank you.

24 THE COURT: Thanks.

25 MR. SCHMIDT: Good afternoon, Your Honor.

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1 Frederick Schmidt, Cozen O'Connor, counsel for Scents at
2 Work. I just wanted to let the Court know that Scents at
3 Work is satisfied with the changes that were made. I want
4 to thank the Debtor's counsel for being very responsive,
5 very constructive, and very cooperative.

6 THE COURT: Okay.

7 MS. LIEBERMAN: Good afternoon, Your Honor. Donna
8 Lieberman, Halperin Battaglia Benzija, counsel for NW
9 Properties, a landlord group. We did file an objection,
10 Your Honor. We are very close to having an agreed side
11 letter. I am optimistic that our objection will be
12 resolved. But since we're not there yet, we do reserve our
13 rights with respect to the final hearing.

14 THE COURT: All right. I take it from no one
15 speaking that no one else -- no one has an issue.

16 MR. HERZ: Your Honor?

17 THE COURT: Oh, sorry. Go ahead.

18 MR. HERZ: It's Michael Herz of Fox Rothschild. I
19 represent landlord Caprep. I apologize for the pause. When
20 you're on the phone it's tough to know if anyone else is at
21 the podium or not.

22 THE COURT: Right.

23 MR. HERZ: We filed an objection. We have
24 principal (indiscernible) with the side letter like some of
25 the other landlords, but it hasn't been finalized yet. Like

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1 the previous counsel, we reserve our rights for the final
2 hearing in case any issues come up in finalizing that
3 letter. Thank you.

4 THE COURT: Okay. That's fine. All right. I
5 have a few questions for the Debtors and maybe I should just
6 go through them. I appreciate, as did several of the
7 counsel who spoke, that the Debtors were quite responsive to
8 the objections. So, these questions I think are sort of
9 second level questions, but I just wanted to make sure that
10 my understanding of this order of the procedures is clear.

11 If we could go to that Paragraph 25, which is the
12 reference to the master lease -- I appreciate Mr. Singh
13 letting me know why it's in there. I just want to make sure
14 I understand this, though. There are aspects of the relief
15 that I'm being asked to grant here that would conceivably
16 breach a lease, like going-dark provisions, for example.

17 MR. SINGH: Right.

18 THE COURT: And as I understand it based on your
19 explanation, this paragraph doesn't cut back on that as far
20 as the stores that are subject to the store closings. It
21 just doesn't give the Debtors license to breach the master
22 lease with respect to other stores? Is that what this is
23 about?

24 MR. SINGH: Yes, Judge. And it reserves their
25 right -- I think they would stand up and tell you -- it

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1 reserves their right if later, it's determined that the
2 leases were not severable and we couldn't have gone-dark
3 with respect to one store but not another. You know, if
4 they want to serve damages, then our rights are reserved and
5 their rights are reserved, but it doesn't prevent us from
6 relying on the order with respect to stores we are closing
7 today.

8 THE COURT: All right. That's helpful. And I
9 gather that's the master lessors' view of this, too. So in
10 other words, it does not take away what the order elsewhere
11 gives as far as the stores that are slated for closing.

12 MR. SINGH: That is right, Judge.

13 THE COURT: But raises the -- preserves the
14 argument that if the leases are all one lease, the landlords
15 might assert a claim under the master lease for that?

16 MR. SINGH: Yeah, I'll let counsel speak but it
17 basically is a practical matter --

18 THE COURT: It's not a specific performance
19 provision, in other words.

20 MR. SINGH: Yeah. As a practical matter, we can
21 proceed with the store closings, you know, relying on your
22 order, but if we can preserve for later the severability
23 issue, including whether or not we had the ability to do
24 that notwithstanding that the master lease wouldn't allow us
25 to do that if it was not severable.

1 THE COURT: Well, you're going to do it, so it's
2 really just a damages issue.

3 MR. SINGH: It's a damages issues.

4 THE COURT: Okay. All right, fine. Okay.

5 MR. SINGH: Yeah. Okay, I think we clarified it
6 what Mr. (indiscernible) said.

7 THE COURT: He indicated that behind you.

8 MR. SINGH: Right.

9 THE COURT: Okay. I'm going to just go through
10 these in order, then. Some of them are really quite minor,
11 but just so we're clear on what I'm signing is, and I will
12 grant this motion. It sets forth a valid basis for the
13 relief and I think the objections have been properly dealt
14 with, at least on an interim basis.

15 Paragraph 3 uses a term "material adverse impact"
16 and actually in the procedures it said "material adverse
17 effect". There's a lot of case law on what a material
18 adverse effect is. I don't know of there's any caselaw on
19 material adverse impact, but is that just for -- if one is
20 to decide this issue it's just decided on a clean slate, is
21 that -- people wanted to avoid effect and have impact?

22 MR. SINGH: Your Honor, I think we can just change
23 -- I don't think that was even --

24 THE COURT: Well, it looks like someone thought
25 about it, because in the procedures they crossed out effect

1 and put in impact, but --

2 MR. SINGH: We may just not have carried that
3 change through --

4 THE COURT: Oh, okay.

5 MR. SINGH: -- to the order, so I think we just
6 missed a conformity change.

7 THE COURT: Well, maybe effect is better because
8 there's a lot of caselaw.

9 MR. SINGH: Yeah. We -- I was just going to say,
10 we're fine with effect.

11 THE COURT: So I think that should go back to
12 effect --

13 MR. SINGH: Yep.

14 THE COURT: -- in both the procedures and the
15 order.

16 This is another just wording issue. On page --
17 well, I did most of my markup on the first black line, so
18 it's Paragraph 7. And the first proviso about two-thirds of
19 the way down, that paragraph says that the assets would be
20 deemed abandoned and you've added the phrase about notice.

21 MR. SINGH: Right.

22 THE COURT: And then the second proviso that says,
23 "Proviso, the Debtor shall remove any hazardous or toxic
24 materials," and then it says, "Any landlord or other
25 designee shall be free notwithstanding the automatic stay to

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1 dispose of the same." And it just wasn't clear to me --
2 entirely clear to me what the same is referring to. Is it
3 referring to the toxic materials or is it referring to any
4 abandoned materials?

5 MR. SINGH: Any abandoned.

6 THE COURT: All right.

7 MR. SINGH: Yeah, so, we can't leave any toxic
8 materials so --

9 THE COURT: Right. Right, so --

10 MR. SINGH: -- it should say dispose of abandoned
11 property.

12 THE COURT: Right. There's Paragraph 21 of the
13 order, deals with as-is and final nature of the sale of the
14 store closing sales.

15 MR. SINGH: Yes.

16 THE COURT: And it refers to the survival of
17 federal and state laws (indiscernible) implied warranties
18 and gives a limited right to return goods. If you go to the
19 procedures in G on Page 2, it talks about the sales also
20 being final with conspicuous signs saying that they're final
21 and then Paragraph 7 of the Abacus Agreement also deals with
22 the final nature of the sales and neither of those
23 provisions mentions anything about the right to return.

24 So I think there should be -- I think people who
25 are buying stuff at these sales should know what their right

1 to return is, so that should be displayed somewhere and
2 Abacus should understand that they have that right.

3 MR. SINGH: That's fine, Your Honor. I think what
4 we can do is we can certainly add it to G in the procedures
5 and, you know --

6 THE COURT: And that's incorporated in the Abacus
7 Agreement, I think.

8 MR. SINGH: Yeah, and regardless, we'll make sure
9 they understand and the company understands and we need to
10 make people aware --

11 THE COURT: Right.

12 MR. SINGH: -- of the proviso.

13 THE COURT: This should just be a sign where
14 people go to the cash register or whreever and say this --
15 you know, these are your rights.

16 MR. SINGH: Right.

17 THE COURT: You gave notice to the state's
18 attorney general and the governmental authorities.

19 MR. SINGH: Yes.

20 THE COURT: And there were no objections and it's
21 understandable because those procedures of the proposed
22 order are consistent with procedures that are followed
23 around the country for sales like this.

24 But I did notice that in a couple of the more
25 recent sales -- Borders and Sports Authority -- people had

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1 21 days to return instead of seven. Is there a reason why
2 it's only a week?

3 MR. SINGH: Well, no, Judge. I think we can
4 expand it because I think during that notice period we can
5 proceed with the sales, so I think it would be okay to give
6 them --

7 THE COURT: I think it's better to make it 21
8 days.

9 MR. SINGH: That's fine.

10 THE COURT: Paragraph 29 -- and this lays out the
11 resolution of the Abacus issue with the U.S. Trustee and the
12 Committee. I think you should just say -- I think there are
13 a couple words left out. About half way down, it says,
14 "connection with these Chapter 11 cases in accordance with
15 the terms of."

16 MR. SINGH: Yes.

17 THE COURT: And it says, "their engagement
18 agreement." I think you should say the liquidation
19 consulting agreement, because I think that's the only
20 agreement we're talking about.

21 MR. SINGH: That is correct, Judge.

22 THE COURT: And then the next sentence says, "Such
23 party shall have 15 days to review and dispute any such
24 invoice submitted by Abacus," and I would add, "comma, which
25 dispute shall be decided by the Court unless resolved by the

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1 parties, comma", and then you would continue on and then go
2 -- so again, that would say, "which dispute shall be decided
3 by the Court unless resolved by the parties", and then you
4 would continue on "if no such disputes are received without
5 any further", and then add the word "order -- of the Court."

6 MR. SINGH: Got it.

7 THE COURT: And then, this appears a couple times.
8 If you look at 31, at the end of that paragraph, there's
9 this proviso that says, "provided that closing stores that
10 are not initial closing stores may be closed under the
11 liquidation consulting agreement or in accordance with any
12 other agreement approved by the Debtors subject to the
13 approval rights of the DIP ABL agents under the terms of the
14 DIP loan agreements."

15 This just says "closed under liquidation
16 consulting agreement." I think you should say "closed under
17 the terms of this order and the liquidation consulting
18 agreement."

19 MR. SINGH: That's right.

20 THE COURT: And I think that's also in the
21 procedures. Anyway, we'll get to that in a second. Okay.
22 And then on turning to the procedures, we already talked
23 about G on Page 2. K and L deal with people claiming their
24 property that isn't Debtor property before it's abandoned.

25 MR. SINGH: Yes.

1 THE COURT: And I just want to -- you said there
2 would be a notice on abandonment.

3 MR. SINGH: Yes.

4 THE COURT: But the notice should include people
5 that you know are lessors or otherwise owners of property
6 that's not sold.

7 MR. SINGH: Yep. We'll make that clear, Judge.
8 That certainly is the intention.

9 THE COURT: Okay. And then I think R, it says
10 that "Abacus or any other liquidation consultant shall
11 continue to have exclusive and unfettered access to the
12 applicable closing store (indiscernible) the Debtors have
13 rejected." I think after the words "shall continue", I
14 think you should say "while retained".

15 MR. SINGH: Yes.

16 THE COURT: And then S is the -- we've already
17 talked about this in the order. This is -- just say "may be
18 closed under the terms of the order and the liquidation
19 consulting agreement."

20 And then I appreciate that the lessors have either
21 stated explicitly or by their silence have implicitly said
22 that they're fine with the order and the procedures as
23 revised, but on the default mechanism I think you should
24 build in a right --or just say that notwithstanding these
25 provisions, a landlord -- "either party shall have the right

1 to seek emergency relief under the case management
2 procedures." You know, if you started to sell, I don't
3 know, some horrible product at the store, I don't think the
4 landlord should have to wait two weeks to stop you all from
5 selling it. Although, I doubt that you'll do that.

6 MR. SINGH: That's fine. We can add that
7 language.

8 THE COURT: All right. So I think that covers it.
9 Let me just see if I had anything else that you had. Oh,
10 yes. There is one more. Yes. The resolution of the
11 consignment issue, I think, largely comes out of the Sports
12 Authority order --

13 MR. SINGH: Yes, Your Honor.

14 THE COURT: -- which is fine and obviously, you
15 know, the Debtors are certainly free to continue with their
16 consignment agreements pending rejection so that's a
17 perfectly logical way to proceed with this.

18 My comment goes to the reservation of rights. I
19 haven't looked at this issue for a couple of years, but as I
20 understand it in my review of the Sports Authority case and
21 the Salander Gallery case kind of confirm this, there are a
22 couple of different ways that parties on either side of the
23 priority issue can win, depending on whether the consigner
24 is a consignee under the UCC or separately and I think the
25 reservation of rights, 37, just deals with one subset of

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1 those issues as opposed to both of them so it's probably
2 better to -- I would think to reserve all rights as to
3 priority, not just under the UCC.

4 MR. SINGH: Yeah, I think that's right, Your
5 Honor. Perhaps we could just say notwithstanding
6 (indiscernible) all parties' rights as to priority and
7 strike the rest, are preserved and shall be resolved
8 (indiscernible).

9 THE COURT: I think that's right because the UCC
10 sets out a regime where if you are a consignor under the
11 definition of the UCC, then that whole set of rules governs
12 but otherwise, there are issues about notice and state law -
13 -

14 MR. SINGH: Right.

15 THE COURT: -- which may vary depending on the
16 states that Sears does business, so I think it's better just
17 to have a general reservation of rights in 37.

18 MR. SINGH: I think that's fine, Your Honor.

19 THE COURT: Okay. So with those changes which, I
20 think, are clear to people, at least I saw various of the
21 counsel that had filed objections nodding their heads in the
22 back behind you and I'm not hearing people speaking up on
23 the phone, I think, assuming that those are in the order or
24 in the procedures, as we just discussed, I will grant the
25 motion.

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1 Clearly, there's no objection to the Debtors'
2 decision to sell the property that they own in these stores
3 or to continue to sell consigned goods as provided in the
4 order and it's based on the entire record of an appropriate
5 exercise of business judgment.

6 363(f) is complied with here with regard to
7 property that the Debtors can sell. There have been no
8 objections by any party asserting an interest in the
9 property that's not resolved by the order and so therefore
10 there's at least one and probably more grounds under 363(f)
11 to sell the property free and clear.

12 As far as the Abacus Agreement is concerned, I've
13 reviewed it and -- oh, I actually did have a couple of
14 questions on it, but as far as the economic terms of it,
15 they seem reasonable to me and I would agree with the
16 Debtors' description of them. These are really minor
17 comments. I don't know if there's anyone here from Abacus
18 to cover this, but -- and I appreciate that Mr. Cohen's been
19 doing this for a long time, so he uses shorthand. But if
20 you go to expenses that get reimbursed --

21 MR. SINGH: Yes.

22 THE COURT: Paragraph 10, that is. The last two
23 are cash over/short and sundry. And I don't know what
24 either of those is, so, if anyone can tell me.

25 MR. SINGH: Your Honor, I have to admit I don't

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1 know either but I will have to clear that up.

2 THE COURT: All right. I hope they're minor,
3 whatever they are.

4 MR. SINGH: Yes.

5 THE COURT: Many, many years ago I worked with him
6 and he spent all afternoon talking about shrinkage and I had
7 no idea what he was talking about until we got in a cab and
8 I could ask him, since the other side was there. But
9 hopefully there's a good explanation of sundry and cash
10 over/short.

11 MR. SINGH: Yes, Your Honor. We'll get the
12 explanation. I think we can report it to the committee and
13 the lenders to make sure it's nothing that --

14 THE COURT: Okay, and --

15 MR. SINGH: -- they would not be comfortable with.

16 THE COURT: This is all -- I mean, this is all
17 qualified by the unspoken word reasonable for these
18 expenses, so --

19 MR. SINGH: We'll also let the U.S. Trustee know
20 (indiscernible) covered.

21 THE COURT: Yeah, it was Paragraph 7 that dealt
22 with the as-is language and we already talked about that in
23 the --

24 MR. SINGH: Yes. We're going to change the
25 procedure so it conforms to the order --

1 THE COURT: And that tracks, then, through their
2 agreement. They're not allowed to do -- they have to comply
3 with the procedures.

4 MR. SINGH: That's right. They have to comply
5 with the procedures and we'll, of course, make sure it's
6 coordinated.

7 THE COURT: Okay. Very well. So I'll look for
8 that order. The Debtors -- I'll authorize them on an
9 interim basis based on today's record to rely on my ruling
10 and to move ahead on an interim basis with the store closing
11 sales, but the order, if you get it in to me reasonably
12 soon, it'll get entered today or tomorrow.

13 MR. SINGH: Okay. Thank you very much, Your Honor.

14 THE COURT: Okay. Thank you.

15 (Whereupon these proceedings were concluded at 2:42 PM)

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1 I N D E X

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3 RULINGS

4 Page Line

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6 Store Closing Sales Authorized on an 41 8
7 Interim Basis

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

5

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6 Ledanski Hyde

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